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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TOYRE TEMPSON et al., Defendants and Appellants.	B203152 (Los Angeles County Super. Ct. No. TA086391)
THE PEOPLE, Plaintiff and Respondent, v. GREGORY MORRIS, Defendant and Appellant.	B203209

APPEAL from judgments of the Superior Court of Los Angeles County, Arthur M. Lew, Judge. Affirmed in part and reversed in part.

Feria & Corona and Jennifer L. Peabody, under appointment by the Court of Appeal, for Defendant and Appellant Toyre Tempson.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant Casey Rowland.

Law Offices of Russell S. Babcock and Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant Clifton G. Brown.

Jonathan P. Milberg, under appointment by the Court of Appeal, for Defendant and Appellant Bertrum Jam Westbrook.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant Gregory Morris.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., David A. Voet, and Sarah J. Farhat, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants, Toyre Tempson, Casey Rowland, Clifton G. Brown, Bertrum Jam Westbrook and Gregory Morris, appeal the judgments entered following their convictions, by jury trial, for six counts of attempted premeditated murder, evading an officer with willful disregard for safety (Rowland only) and false imprisonment by violence or menace (Rowland only), with firearm (except Rowland and Westbrook), criminal street gang, and prior serious felony conviction (Westbrook only) enhancements (Pen. Code, §§ 664/187, 236/237, 12022.53, 186.22, 667, subd. (a)-(i); Veh. Code, § 2800.2).[1]

The defendants were sentenced to state prison for the following terms: Tempson and Brown were each sentenced to terms of 215 years to life; Westbrook was sentenced to 185 years to life; Rowland was sentenced to 92 years, 8 months to life; and, Morris was sentenced to 25 years to life.

The judgments are affirmed in part and reversed in part.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

On the afternoon of August 31, 2006, the funeral procession for a member of the Hoover gang passed by an apartment complex on North Bullis Road in Compton. Some of the people in the funeral procession were throwing gang signs. Members of the Mob Piru gang, who were standing outside the apartment complex, responded by throwing up their own gang signs.

A couple of hours later, defendants Tempson, Rowland, Brown, Westbrook and Morris drove up to the apartment complex in a stolen yellow Hummer. Two of the defendants jumped out and started shooting. Shots were also fired from inside the Hummer. After a minute or two, the shooting stopped and the defendants drove off. Six people standing in front of the apartment complex were hit by the gunfire.

Officers who responded to the shooting scene spotted the yellow Hummer. Rowland was driving, Brown was in the front passenger seat, and there appeared to be more people in the back seat. The officers gave chase and other units joined in. Rowland ran a red light and went through three stop signs at high speed. He hit a parked tractor trailer, drove across six lanes of traffic on the Imperial Highway, jumped a curb and crashed into a vacant field.

The Hummer's occupants fled on foot. Morris was captured in the field where the Hummer crashed. Police established a perimeter around the area. Two people approached Officer Chris Smelser and reported that someone had come into their house. Ultimately, the police arrested Rowland and Brown inside the house. Westbrook and Tempson were discovered hiding beneath another house. Inside the Hummer, officers found an automatic rifle, a 12-gauge shotgun, a revolver and a semiautomatic handgun.

An eyewitness to the shooting made in-field identifications of Rowland, Brown, Tempson and Westbrook. Morris told police he had exited the Hummer at the apartment complex holding a shotgun, but he claimed not to have done any shooting.

All five defendants were members of the Eight Trey Hoover Crips gang. The Eight Trey Hoovers began as a Crip gang, but later became rivals of both Crip and Blood gangs. The people in the front of the apartment complex throwing gang signs were members of the Mob Piru Bloods gang. Gang members are expected to attend the funeral of a fellow gang member and it is disrespectful to mock a rival gang's funeral procession. The Eight Trey Hoovers disliked drive-by shootings, preferring to exit their vehicles in order to shoot at rivals. This style of assault is known as "J.O.B." or "jump out boys." Answering a hypothetical question based on the facts presented at trial, a gang expert opined the shooting in front of the apartment complex had been in retaliation for the disrespect shown during the funeral.

2. *Defense evidence*.

An eyewitness testified the men who got out of the yellow Hummer at the apartment complex were wearing masks that concealed their faces.

CONTENTIONS

1. There was insufficient evidence to sustain Rowland's conviction for felony false imprisonment.

2. The trial court erred by not instructing Rowland's jury on misdemeanor false imprisonment as a lesser included offense.

3. The trial court erred by denying the requests of Rowland, Tempson and Westbrook to represent themselves at sentencing.

4. Rowland's sentence for evading an officer with willful disregard for safety was improper.

5. The trial court erred by using the gang enhancement statute to impose 15-year minimum parole eligibility terms on Tempson, Brown and Morris.

6. The trial court erred when it calculated defendants' presentence custody credits.

DISCUSSION

1. *Sufficient evidence to sustain Rowland's conviction for felony false imprisonment.*

Rowland contends there was insufficient evidence to sustain his conviction for felony false imprisonment. This claim is meritless.

a. *Legal principles.*

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

" 'An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] 'Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the

verdict of the [finder of fact].' [Citation.]" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.] Thus, when a criminal defendant claims on appeal that his conviction was based on insufficient evidence of one or more of the elements of the crime of which he was convicted, we *must* begin with the presumption that the evidence of those elements *was* sufficient, and the defendant bears the burden of convincing us otherwise. To meet that burden, it is not enough for the defendant to simply contend, 'without a statement or analysis of the evidence, . . . that the evidence is insufficient to support the judgment[] of conviction.' [Citation.] Rather, he must *affirmatively demonstrate* that the evidence is insufficient." (*Ibid.*)

b. *Evidence at trial.*

After the Hummer crashed in the field, Rowland and Brown fled on foot and were ultimately captured inside a private home. Rowland's conduct inside that house gave rise to his false imprisonment conviction.

Deputy Sheriff Smelser testified that after chasing the Hummer, he and his partner parked their patrol car and joined the search on foot. A woman and a man came running out of a house. The woman, Maria, was frantic and said there was someone in her house. Through a window in the house, Smelser could see a small child, subsequently identified as Maria's eight-year-old daughter, Gabriella.

"A She was hysterical. Extremely scared. Crying. She was shaking.

"Q What happened next?

"A I asked her if someone was in the house, and she said in a hush tone, yes, there was somebody in the house. . . . [¶] . . . [¶] We could also hear screams from another female inside the house. A second female Hispanic appeared in the window just above Gabriella."

The second person was Gabriella's 18-year-old sister, Ana. She, too, according to Smelser, "was hysterical. She was scared. She confirmed that somebody was inside of

the house. That she couldn't get to the front door. She was too afraid or just physically couldn't get there, and that the bars would not open on the window."

Maria testified she had been in her backyard when she suddenly saw a strange man. Maria and her brother-in-law, who lived with her, ran into the house through the back door. The stranger followed them. As she ran through the house, Maria yelled to Ana, "Call 911. A man came into the house." Maria and her brother-in-law kept going; they ran out the front door and contacted police officers on the street.

Ana testified she was lying on the couch when her mother ran in the back door and said, "There is someone trying to get in the house. Call 911." Ana ran to her mother's bedroom and called 911. She looked out the window and "saw it was a whole group of cop cars. And I saw my mom and my uncle running in the front, and I was really scared."

After a while, Ana opened the bedroom door and saw Gabriella in the hallway. Rowland was standing behind her. Ana grabbed Gabriella by her shirt, pulled her into the bedroom, and tried to close the door: "I . . . was trying to push the door, but he kind of pushed it back. And . . . I said out loud – I'm sure he heard me – I said, 'Leave me alone. I didn't do anything to you.' And he let go, and I just closed [and locked] the door." Later, Ana opened the bedroom door for the police, who arrested Rowland and Brown inside the house. From a photo array, Ana identified Rowland as the man she saw in the hall standing behind Gabriella.

c. *Discussion.*

(1) *The law of false imprisonment.*

"Section 236 defines false imprisonment as 'the unlawful violation of the personal liberty of another.' Section 237 provides that punishment for false imprisonment may either be a fine not exceeding $1,000 or by imprisonment in the county jail for not more than one year or both, except where 'such false imprisonment [is] effected by violence, menace, fraud, or deceit . . . .' In such circumstances, false imprisonment is a felony and is 'punishable by imprisonment in the state prison.' (§ 237.)" (*People v. Hendrix* (1992) 8 Cal.App.4th 1458, 1461-1462.) " ' "In order to constitute a case of false imprisonment,

it is essential that there be some restraint of the person; but it is not necessary that there be confinement in a jail or prison. Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his [or her] liberty or is compelled to remain where he [or she] does not wish to remain, or to go where he [or she] does not wish to go, is false imprisonment. The wrong may be committed by acts or by words, or both, and by merely operating upon the will of the individual or by personal violence, or both. . . .' ' [Citations.]" (*People v. Zilbauer* (1955) 44 Cal.2d 43, 51.)

"Force is an element of both felony and misdemeanor false imprisonment. Misdemeanor false imprisonment becomes a felony only where the force used is greater than that reasonably necessary to effect the restraint. In such circumstances the force is defined as 'violence' with the false imprisonment effected by such violence a felony." (*People v. Hendrix, supra,* 8 Cal.App.4th at p. 1462.) "When a rational fact finder could conclude that a defendant's acts or words expressly or impliedly threatened harm, the fact finder may find that there is menace sufficient to make false imprisonment a felony. An express threat or use of a deadly weapon is not necessary." (*People v. Wardell* (2008) 162 Cal.App.4th 1484, 1491

(2) *Sufficient evidence of threatened harm*.

Initially, Rowland contends he was improperly convicted of having committed any crime against Ana because there was insufficient evidence he was the person who pushed on the bedroom door. He argues that, although Ana saw him in the hallway, "once the bedroom door was closed, she could not see who was on the other side. Since both appellant and Brown were in the house, it may well have been Brown, not appellant, who was resisting the efforts of [Ana] to close the door." But this ignores the logical inferences the jury could have drawn from the following portion of Ana's testimony.

"A I just grabbed her by her shirt and pulled her in the room, and I tried to close the door.

"Q That would be Gabriella?

"A Gabriella, yeah.

"Q And what exactly did you do?

"A I mean, I was trying to push the door, but he kind of pushed it back. And I was just – I said out loud – I'm sure he heard me – I said, 'Leave me alone. I didn't do anything to you.' And he let go, and I just closed the door."

Given the apparent rapidity with which these events occurred, a reasonable jury could have concluded the person pushing on the door must have been Rowland. (*People v. Sanghera*, *supra*, 139 Cal.App.4th at p. 1573 [Court of Appeal must accept logical inferences jury could have drawn from circumstantial evidence].) Hence, there was sufficient evidence Rowland was the person who pushed on the door.

Alternatively, Rowland contends there was insufficient evidence to prove the force or menace element of felony false imprisonment. He argues Ana "went to her mother's room *of her own accord* in order to call 911 when made aware that someone was in the house. Thereafter, she remained in the room although there was no evidence that appellant or his companion did anything to compel her to do so." (Italics added.) Rowland also argues that, even if there were sufficient evidence he committed misdemeanor false imprisonment by causing Ana to hide in the bedroom, there was no evidence he used force or menace in so doing because the moment Ana told him to leave her alone he complied and she was able to lock the door.

The Attorney General argues the evidence demonstrated an initial misdemeanor false imprisonment had evolved into a felony false imprisonment. That is, Rowland's entry into the house "caused Ana's mother and uncle to flee from the house. Ana sought refuge in her mother's bedroom. When Ana tried to leave the bedroom, she saw appellant Rowland standing near her eight-year-old sister. Appellant Rowland's continued illegal and menacing presence caused Ana to take her sister and retreat to her mother's bedroom a second time. Under these circumstances, appellant Rowland unlawfully violated Ana's personal liberty because the victim was compelled, against her wishes, to remain in her mother's room." The Attorney General argues this initial misdemeanor false imprisonment became a felony when Rowland "momentarily attempted to force his way into the bedroom where Ana and her . . . sister were already imprisoned. A rational factfinder could conclude that appellant Rowland's action implied

that Ana, or her sister, would be harmed if Ana attempted to leave the bedroom or impede appellant Rowland's actions in any way." (Italics omitted.) That Rowland "relented after the victim screamed does not erase the menace created by the unnecessary act of pushing against the door after the victim was already falsely imprisoned."

As support for this reasoning, the Attorney General relies on *People v. Castro* (2006) 138 Cal.App.4th 137. There, 16-year-old Diana was walking to a bus stop on her way to school. Castro drove slowly by and repeatedly asked if she wanted a ride. When Diana turned around and said no, Castro said, " 'I'll give you $10 if you let me lick your thing.' " (*Id*. at p. 139.) Diana replied, " 'How could you say that? You're a dirty man,' " and kept walking. (*Ibid*.) Castro then grabbed her arm, turned her around, and pulled her toward him. Diana managed to get loose and run away. On appeal, Castro argued he did not commit felony false imprisonment because there was insufficient evidence he used more force than reasonably necessary to restrain Diana. The Court of Appeal disagreed: "[A]ppellant grabbed the victim and turned her around. If that is all that had happened, we would agree with appellant that his conduct amounted only to misdemeanor false imprisonment. But appellant pulled her toward his car, an act more than what was required to stop her and keep her where she was located. The record is silent whether the victim, when testifying, used body language which may have given the jury additional information than what is contained in the sterile record we have to review. In any event, we conclude the evidence that appellant used force to pull the victim toward his car was sufficient to establish force above that required for misdemeanor false imprisonment." (*Id*. at p. 143.)

We agree with the Attorney General's analysis. Rowland's threatening presence in Ana's house caused her to be falsely imprisoned in her mother's bedroom. When Rowland pushed on the bedroom door, he used force or menace beyond that needed to keep Ana in the bedroom.

We disagree with Rowland's apparent assertion there was no false imprisonment at all until he pushed on the door because Ana "voluntarily" went into her mother's bedroom. The evidence shows Ana closed the bedroom door and stayed there because

her mother had warned her there was a stranger in the house. Moreover, when Ana opened the door and saw Rowland in the hallway, she grabbed her sister, dragged her into the bedroom, and tried to close the door again. "Any exercise of force, or express or implied threat of force, by which in fact the other person is deprived of his [or her] liberty or is compelled to remain where he [or she] does not wish to remain, or to go where he [or she] does not wish to go, is false imprisonment." (*People v. Zilbauer, supra*, 44 Cal.2d at p. 51.) The jury could have reasonably concluded Ana's personal liberty was infringed when she was compelled, by fear of Rowland's illegal entry into her house, to hide behind the closed bedroom door either initially or after grabbing her sister.

We further disagree with Rowland's argument he did not commit felony false imprisonment because his act of "pushing on the door was *not done for the purposes of further confining Ana* and her sister, but apparently to see what they were up to, such as, if they were calling the police or otherwise advising others of appellant's presence." (Italics added.) The jury did not have to read Rowland's intent this way. And in any event, false imprisonment is a general intent crime. (See *People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1399-1400; *People v. Swanson* (1983) 142 Cal.App.3d 104, 109). Rowland need not have intended to cause Ana's confinement by force or menace when he pushed on the bedroom door, any more than Castro had to have intended to falsely imprison Diana by force or menace when he spun her around in his direction. Because "felony false imprisonment requires only general criminal intent . . . the defendant must [only] intend to commit an act, the natural, probable and foreseeable consequence of which is the nonconsensual confinement of another person [citations]; or, to put it another way, false imprisonment requires only the 'wrongful intent' to commit the forbidden act. [Citations.]" (*People v. Olivencia, supra,* at pp. 1399-1400.) "When a rational fact finder could conclude that a defendant's acts or words expressly or impliedly threatened harm, the fact finder may find that there is menace sufficient to make false imprisonment a felony." (*People v. Wardell, supra,* 162 Cal.App.4th at p. 1491.)

There was sufficient evidence to sustain Rowland's conviction for having committed felony false imprisonment against Ana. However, as discussed *post*, this conviction must be reversed because the trial court failed to instruct the jury on a necessarily included lesser offense.

2. *Trial court prejudicially erred by not instructing Rowland's jury on misdemeanor false imprisonment.*

Rowland contends the trial court committed prejudicial error by failing, sua sponte, to instruct the jury on the lesser included offense of misdemeanor false imprisonment. This claim has merit.

a. *Legal principles.*

"When there is substantial evidence that an element of the charged offense is missing, but that the accused is guilty of a lesser included offense, the court must instruct upon the lesser included offense, and must allow the jury to return the lesser conviction, even if not requested to do so." (*People v. Webster* (1991) 54 Cal.3d 411, 443.) "An offense is necessarily included within a charged offense 'if under the statutory definition of the charged offense it cannot be committed without committing the lesser offense, or if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed.' [Citation.]" (*People v. Toro* (1989) 47 Cal.3d 966, 972, disapproved on other grounds by *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.) "[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) " 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" ' that the lesser offense, but not the greater, was committed. [Citations.]" (*Ibid.*) "[O]n appeal we employ a de novo standard of review and independently determine whether an instruction on the lesser included offense of voluntary manslaughter should have been given." (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) "[I]n a noncapital

case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v. Watson* (1956) 46 Cal.2d 818, 836]. A conviction of the charged offense may be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred [citation]." (*People v. Breverman, supra*, 19 Cal.4th at p. 178, fn. omitted.)

b. *Discussion*.

The Attorney General argues there was no need to instruct on misdemeanor false imprisonment: "Rowland's actions amounted to nothing less than felony false imprisonment because he chose to *unnecessarily* menace the victim and her sister by pushing against the door after they were already imprisoned. As the victim was already imprisoned against her will, the only reasonable explanation for appellant Rowland's action was to convey the message that the victim or her sister would be harmed if they attempted to flee or interfere. Furthermore, there was no testimony or other evidence which controverted the victim's testimony that the perpetrator used menace to effectuate the false imprisonment."

We disagree with this argument because Rowland's act of pushing on the bedroom door was ambiguous. Although, as we have already held, *ante*, a reasonable jury could have concluded Rowland's act impliedly signaled to Ana she would be in danger if she tried to leave the bedroom, this is not the only reasonable interpretation of the evidence. *Castro* is instructive on this point because it, too, involved an initial misdemeanor false imprisonment that arguably escalated into felony false imprisonment by the additional use of force or menace. Castro committed misdemeanor false imprisonment by putting his hand on Diana to stop her from walking away. This crime then arguably escalated into felony false imprisonment when, in addition, Castro pulled Diana in his direction. *Castro* concluded a lesser included offense instruction was required: "The facts are sufficiently ambiguous that a conviction for misdemeanor false imprisonment might also

have been justified, depending on the actual force [Castro] used in drawing the victim toward himself." (*People v. Castro, supra,* 138 Cal.App.4th at p. 144.) Rowland's pushing on the bedroom door was at least as ambiguous as Castro's act of pulling Diana toward him.

The Attorney General argues any instructional error was harmless: "The jury learned that appellant Rowland engaged in a 'jump out' shooting with fellow gang members before fleeing from the police. Afterward, [he] illegally entered the victim's home in an effort to avoid arrest, and in doing so, terrorized the victim's family. The victim could see the police outside her house and presumably understood that appellant Rowland was a wanted criminal. This uncontroverted evidence established that appellant Rowland falsely imprisoned the victim and then engaged in the additional unnecessary menacing act of pushing against the door of the room where the victim sought refuge. This undisputed unnecessary menacing act constituted an implied threat to harm the victim or her eight-year-old sister. Under these circumstances, even if the court had instructed the jury as appellant Rowland wished, there is no reasonable probability that the jury would have found him guilty of merely misdemeanor false imprisonment because the uncontroverted facts show he used unnecessary force and menace."

We disagree. Again, *Castro* is instructive. The Court of Appeal there held the failure to instruct on the lesser included offense was not harmless because of the ambiguous evidence separating felony false imprisonment from misdemeanor false imprisonment: "We have previously concluded there is sufficient evidence to support the conviction for felony false imprisonment. But the facts contained within the sterile record are not so strong as to permit us to conclude the error was not prejudicial." (*People v. Castro, supra,* 138 Cal.App.4th at p. 144.)

The same is true here. Ana testified, "I was trying to push the door, but he kind of pushed it back." A properly instructed jury might have returned a misdemeanor false imprisonment verdict depending on how it viewed Rowland's act of pushing against the bedroom door. Rowland's conviction for felony false imprisonment must be reversed.

3. *Denial of Faretta motions for self-representation was either proper or harmless error.*

a. *Defendants' claims*.

Rowland and Tempson contend the trial court erred when it denied their requests, made under *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562], to represent themselves at sentencing. Westbrook contends the trial court erred by denying his request to represent himself both at his court trial on a prior conviction allegation and at sentencing.

We conclude the trial court did not err by denying Rowland and Westbrook's motions for self-representation. We further conclude any error in denying Tempson's request for self-representation was harmless.

b. *Proceedings below*.

On October 2, 2007, the defendants appeared in the trial court for sentencing. In addition, Westbrook was scheduled to have a court trial on a prior conviction allegation.

Rowland's case was called first. The trial court began by saying: "[B]efore I forget . . . I should indicate on the record that . . . earlier during the trial . . . Mr. Rowland was found with a handcuff key . . . and for that and other reasons, he was restrained at the second portion of the trial. [¶] And . . . my bailiff tells me this morning that Mr. Rowland was found with a razor blade when he was brought here. And, again, that's why he is in restraints."

Defense counsel said Rowland wanted to represent himself at sentencing. The trial court denied the request: "I've thought about this. You know, Mr. Rowland's conduct during this trial has not been stellar, to say the least. Among other things, there was the handcuff key that was found on his person earlier in the trial. And this very morning, when he was brought to the courthouse for this hearing, he was found with a razor blade secreted in his clothing. And his conduct is such that I find good cause to deny his request to go pro per. That kind of conduct cannot be tolerated by the court."

After defense counsel argued Rowland had not made any disruptive outbursts inside the courtroom, the trial court added it was also denying the *Faretta* request as untimely.

Rowland then addressed the court:

"Your Honor, I plan on filing my [motion for new trial] on newly discovered evidence that was going to exonerate me on the conviction, period. And as far as the handcuff key, I was never caught. The investigating officer spoke to friends of his, deputies down there in the county jail, that somehow – you know what I'm saying – they ended up saying I had a key. I never saw a key. I was never found in possession of a key.

"Same thing this morning, your Honor. When they searched me, I told them that I had a comb – it was a comb and a razor that I used to cut Mr. Tempson's hair and Mr. Brown's hair. It wasn't for a security threat against none of the deputies or inmates.

"There is no reason I see why I shouldn't be granted my pro per status so I could file my . . . motion for a new trial.

"The Court: All right. Well, I guess that confirms the fact that he had a razor with him."

Following argument by defense counsel, the trial court sentenced Rowland.

Next to appear was Tempson. His attorney said Tempson "just informed me that he wants to exercise his *Faretta* rights as well. [¶] The Court: All right. The court finds that his request is untimely, and it is denied." Following argument by Camry's counsel, Tempson was sentenced.

Then it was Westbrook's turn. His attorney said Westbrook had called him "last week and indicated his desire to deal with the rest of his case as a pro per." The trial court denied the request: "First of all, I find that it's untimely. Secondly, I find that your conduct this morning when you were brought to the courthouse for sentencing was conduct that I would not tolerate. And that being the case, I certainly am not going [to] allow you to go pro per, if you're pulling antics like that. And for that reason, I find good cause to deny your request to go pro per."

The trial court had earlier described what happened that morning: "[W]hen he was brought into the courthouse, because they found a razor blade on Mr. Rowland . . . they removed the clothing from each of the four defendants in this case and X-rayed them. And after they did that, Mr. Westbrook was refusing to put his clothes on and come to court. And it wasn't until after [defense counsel] went down and had a chat with him [that Westbrook acquiesced]."

c. *Discussion.*

"A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. [Citations.] At the same time, the United States Supreme Court has held that because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself. [Citation.] [¶] . . . [¶] . . . '[U]nlike the right to be represented by counsel, the right of self-representation is not self-executing. In *Faretta,* . . . the court held that a knowing, voluntary, and unequivocal assertion of the right of self-representation, made weeks before trial by a competent, literate defendant, should have been recognized [citation]; subsequent decisions of lower courts have required expressly that the defendant make a timely and unequivocal assertion of the right of self-representation. [Citations.]" (*People v. Marshall* (1997) 15 Cal.4th 1, 20-21.)

(1) *Rowland's <u>Faretta</u> request was properly denied.*

The trial court properly denied Rowland's motion for self-representation. "[S]entencing is a proceeding separate and distinct from the trial. [¶] The concern that led to the conclusion that motions for self-representation made during trial are subject to the trial court's discretion, namely the potential disruption of proceedings already in progress, simply does not apply to sentencing hearings, which are separate proceedings from the trial and occur after the trial has been completed. This is not to say that every request for self-representation at sentencing will be timely. *Much as a request to represent oneself at trial must be made a reasonable time before trial commences, the request for self-representation at sentencing must be made within a reasonable time prior*

to commencement of the sentencing hearing. [Citation.]" (*People v. Miller* (2007) 153 Cal.App.4th 1015, 1024, italics added.)

Rowland's *Faretta* request was made on the day set for sentencing. By analogy to the timeliness requirement for self-representation at trial, we conclude this was not a reasonable time prior to commencement of the sentencing hearing and, therefore, the request was untimely. *Faretta* motions made on the eve-of-trial are routinely held to be untimely. (See *People v. Clark* (1992) 3 Cal.4th 41, 99 [*Faretta* request made during 10-day trailing period was, in effect, made on the eve-of-trial and, therefore, was untimely]; *People v. Burton* (1989) 48 Cal.3d 843, 853 [*Faretta* motion made "after the case had been called for trial, both counsel had answered ready, and the case had been transferred to a trial department for pretrial motions and jury trial" was untimely]; *People v. Rudd* (1998) 63 Cal.App.4th 620, 626 ["motions for self-representation made on the day preceding or on the trial date have been considered untimely"].)

" 'When a motion for self-representation is not made in a timely fashion prior to trial, self-representation no longer is a matter of right but is subject to the trial court's discretion.' [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 959.) "In exercising that discretion, a trial court is required to consider (1) the quality of counsel's representation, (2) the defendant's prior proclivity to substitute counsel, (3) the reasons for the request, (4) the length and stage of the proceedings, and (5) the disruption or delay which might reasonably be expected to follow the granting of such a motion. (*People v. Windham* (1977) 19 Cal.3d 121, 128 . . . .)" (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1204.) However, a trial court need not explicitly consider the *Windham* factors on the record. (See *id.* at p. 1206 [although "the trial court may not have explicitly considered each of the *Windham* factors, there were sufficient reasons on the record to constitute an implicit consideration of these factors"]; *People v. Perez* (1992) 4 Cal.App.4th 893, 904 ["While the court did not specifically make [a *Windham*] inquiry, we conclude there were sufficient reasons on the record for the court to exercise its discretion to deny the request."].)

"When a trial court exercises its discretion to deny a motion for self-representation on the grounds it is untimely, a reviewing court must give 'considerable weight' to the court's exercise of discretion and must examine the total circumstances confronting the court when the decision is made. [Citation.]" (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1397-1398.)

Of all the *Windham* factors, the most important is arguably the potential for serious disruption of the trial process. Even a former grant of pro se status may properly be revoked if a defendant's improper conduct gives rise to a reasonable prediction the trial might be seriously disrupted. "[*Faretta*] held that an accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol." (*McKaskle v. Wiggins* (1984) 465 U.S. 168, 173 [79 L.Ed.2d 122].) "[T]he term 'abide' [as used by *McKaskle*] connotes a willingness 'to accept without rejection,' 'to conform,' or 'to acquiesce in.' " (*People v. Poplawski* (1994) 25 Cal.App.4th 881, 895; see also *Peters v. Gunn* (9th Cir. 1994) 33 F.3d 1190, 1192 ["A defendant's right to self-representation may be overridden if he demonstrates an inability or unwillingness 'to abide by rules of procedure and courtroom protocol' "].)

Thus, *People v. Clark, supra,* 3 Cal.4th 41, upheld a midtrial decision to temporarily revoke a defendant's pro se status on the ground the defendant had engaged in "a series of attempts to manipulate or coerce the trial court." (*Id.* at p. 115.) *People v. Davis* (1987) 189 Cal.App.3d 1177, 1199-1201, disapproved on other grounds in *People v. Snow* (1987) 44 Cal.3d 216, 225, affirmed the termination of pro se status because of defendant's disruptive conduct, which included vituperative statements and disparaging remarks directed at the court.

It does not matter if the defendant's only misconduct so far has taken place outside the courtroom. "Regardless of where it occurs, a court may order termination for misconduct that seriously threatens the core integrity of the trial." (*People v. Carson* (2005) 35 Cal.4th 1, 6.) "Termination of the right of self-representation is a severe sanction and must not be imposed lightly. Nonetheless, we believe trial courts should be

given sufficient discretion when confronted with behavior – whether occurring in court or out of court – that threatens to compromise the court's ability to conduct a fair trial." (*Id*. at p. 7.)

"One form of serious and obstructionist misconduct is witness intimidation, which by its very nature compromises the factfinding process and constitutes a quintessential 'subversion of the core concept of a trial.' [Citation.] . . . [¶] In citing this example, we do not suggest witness intimidation is the only type of serious and obstructionist out-of-court misconduct that may warrant termination of self-representation. (See, e.g., *People v. Rudd, supra,* 63 Cal.App.4th at p. 633 [defendant's "duplicity and dishonesty" in not being ready for trial as promised]; cf. *Illinois v. Allen* [(1970)] 397 U.S. [337] ["disruptive, contumacious, stubbornly defiant defendants"].) Whenever 'deliberate dilatory or obstructive behavior' threatens to subvert 'the core concept of a trial' [citation] or to compromise the court's ability to conduct a fair trial [citation], the defendant's *Faretta* rights are subject to forfeiture." (*People v. Carson, supra,* 35 Cal.4th at pp. 9-10.)

There can be no doubt the trial court here was justified in denying self-representation to Rowland. He had already been shackled for an earlier security incident in which he allegedly possessed a handcuff key. On the very morning he requested self-representation, Rowland arrived at the courthouse armed with a razor blade. Much like witness intimidation, the threat of violence in the courtroom constitutes a "quintessential 'subversion of the core concept of a trial.' " (*People v. Carson, supra,* 35 Cal.4th at p. 9; see *People v. Hamilton* (1988) 45 Cal.3d 351, 367-369 [where defendant's violent confrontations with jail deputies caused trial court to shackle him, concern about courtroom security was valid basis for denying self-representation].)

The trial court did not err by denying Rowland's *Faretta* request.

(2) *Westbrook's Faretta request was properly denied..*

We conclude the trial court did not err by denying Westbrook's request for self-representation.

To the extent Westbrook's *Faretta* request related to his upcoming court trial on the prior conviction allegation, it was untimely because it "came in 'midtrial' of a proceeding which had been divided into separate components for defendant's benefit. It was therefore not timely and the trial court was not absolutely required to grant it." (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1048.) "Although a bifurcated trial on allegations of a prior conviction has some of the elements of a separate trial, the court in *People v. Givan* (1992) 4 Cal.App.4th 1107, 1114 . . . , concluded that proceedings on the priors was merely a part of the trial, so that a motion for self-representation made before that portion of proceedings was not timely. The court relied on *People v. Hamilton* (1988) 45 Cal.3d 351, 369 . . . , in which the Supreme Court held that, for *Faretta* purposes, the penalty phase in a capital case was 'merely a stage in a unitary trial.' [Citation.]" (*Ibid.*)

Westbrook argues his *Faretta* request as it related to sentencing was timely because he told defense counsel about it a week earlier and he cannot be blamed if counsel failed to notify the trial court. Westbrook does not, however, cite any authority for the proposition we should calculate the date of his request as the day he spoke to defense counsel. In any event, *Faretta* motions made up to six days before trial have been held untimely. (See *People v. Scott, supra,* 91 Cal.App.4th at p. 1205 [*Faretta* motion four days before trial was untimely]; *People v. Hill* (1983) 148 Cal.App.3d 744, 757 [*Faretta* motion five days before trial could have been held untimely]; *People v. Ruiz* (1983) 142 Cal.App.3d 780, 791 [*Faretta* motion six days before trial was untimely].) The trial court here would not have abused its discretion by finding a seven-day notice untimely.

But even assuming, arguendo, Westbrook's *Faretta* request were timely, the trial court's denial of self-representation was still proper. "*Faretta* itself warned that a trial court 'may terminate self-representation by a defendant who deliberately engages in

serious and obstructionist misconduct.' [Citation.] We assume the same rule applies to the denial of a motion for self-representation in the first instance when a defendant's conduct prior to the *Faretta* motion gives the trial court a reasonable basis for believing that his self-representation will create disruption. . . . [¶] Thus, a trial court must undertake the task of deciding whether a defendant is and will remain so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation. The trial court possesses much discretion when it comes to terminating a defendant's right to self-representation and the exercise of that discretion 'will not be disturbed in the absence of a strong showing of clear abuse.' [Citations.] We see no reason not to use the same deference when it comes to deciding whether a defendant's motion for self-representation should be granted in the first instance." (*People v. Welch* (1999) 20 Cal.4th 701, 734-735,)

Westbrook argues his actions were insufficient to constitute serious misconduct because, while he "understandably felt that he was being unfairly punished for Mr. Rowland's misconduct in having a razor blade and a handcuff key, he did (after having a chat with his counsel) agree to wear the new jail clothing and wear handcuffs in court. In the absence of any previous 'disruptive' 'antics' – either in or out of court – the court's refusal to allow Westbrook to represent himself was manifestly unreasonable."

We do not agree. Although Westbrook's misconduct, i.e., refusing to cooperate with additional security measures necessitated by the razor blade incident, was not as serious as Rowland's misconduct, the trial court apparently believed it was sufficiently linked to the issue of courtroom safety that it had Westbrook handcuffed. Hence, given the considerable weight we must grant to a trial court's exercise of discretion in this area (see *People v. Howze*, *supra*, 85 Cal.App.4th at p. 1397), we cannot fault the trial court for denying Westbrook's *Faretta* motion.

The trial court did not err by denying Westbrook's request for self-representation.[2]

(3) *Tempson's Faretta request was improperly denied, but the error was harmless.*

Although Tempson's request for self-representation was untimely, the trial court rejected it out of hand without citing any of the *Windham* factors. The trial court did not say it believed Tempson was a security risk. And, unlike Rowland's telling the trial court he planned to file a new trial motion, Tempson did not say anything indicating a grant of pro se status would necessitate a continuance.

But even if the trial court erred by denying Tempson's untimely *Faretta* request, "this error is not automatically reversible, but is reviewed under the 'harmless error' test of *Watson*." (*People v. Rivers, supra*, 20 Cal.App.4th at p. 1050.) That is because, while "[e]rror in denying a *timely Faretta* motion is reversible per se," "once trial has commenced, the right to self-representation is no longer based on the Constitution. [Citation.]" (*Ibid.*)

The Attorney General properly notes "[d]enial of self-representation at sentencing typically cannot cause prejudice." "It is candidly recognized that a defendant who represents himself virtually never improves his situation or achieves a better result than would trained counsel. [Citation.]" (*People v. Rivers, supra*, 20 Cal.App.4th at p. 1051.) "The United States Supreme Court has also pointed out that the 'core' of the *Faretta* right is the right 'to preserve actual control over the case he [defendant] presents *to the jury*.' [Citation.]" (*Id*. at p. 1052.) The Attorney General then complains Tempson does not even try to demonstrate that, had he been granted self-representation, he would have been able to convince the trial court to impose a more lenient sentence.

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[2] Following oral argument, Westbrook filed a supplemental letter brief asserting that a new decision, *People v. Butler* (2009) 47 Cal.4th 814, is directly on point and dispositive of this issue. Not so. As the Attorney General points out, *Butler* is inapposite because it did not decide if the defendant's status as a security risk justified revocation of his right to self-representation. *Butler* did not have to reach this issue because the trial court based revocation on a different ground.

Tempson replies: "On appeal, counsel could now speculate about what appellant intended to present to mitigate his sentence, but such speculation would not be based on the record because the court refused to permit appellant to speak. . . . Had appellant been able to speak, he could have shared the actual mitigating evidence he intended to present. The court's error in this case requires reversal."

But the trial court "refused to let Tempson speak" only in the sense it denied his untimely *Faretta* motion. Tempson still could have told the trial court why it should be lenient. "California law, through section 1204,[[3]] gives a criminal defendant the right at sentencing to make a *sworn* personal statement in mitigation that is *subject to cross-examination* by the prosecution." (*People v. Evans* (2008) 44 Cal.4th 590, 600.)

Defense counsel argued for lenience on the ground "Tempson is the youngest of the group, and clearly not the leader. There was some . . . reasonable doubt as to whether he was the actual shooter or not." Tempson does not indicate what alternative arguments he would have made had he been allowed to represent himself at sentencing.

Hence, we conclude that, although the trial court improperly denied Tempson's untimely *Faretta* motion, the error was harmless because Tempson has failed to demonstrate a reasonable probability he would have achieved a more successful outcome at sentencing had he represented himself.

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[3] Section 1200 provides: "When the defendant appears for judgment he must be informed by the Court, or by the Clerk, under its direction, of the nature of the charge against him and of his plea, and the verdict, if any thereon, and must be asked whether he has any legal cause to show why judgment should not be pronounced against him." Section 1204 provides: "The circumstances shall be presented by the testimony of witnesses examined in open court, except that when a witness is so sick or infirm as to be unable to attend, his deposition may be taken by a magistrate of the county, out of court, upon such notice to the adverse party as the court may direct. No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except as provided in this and the preceding section. This section shall not be construed to prohibit the filing of a written report by a defendant or defendant's counsel on behalf of a defendant if such a report presents a study of his background and personality and suggests a rehabilitation program. If such a report is submitted, the prosecution or probation officer shall be permitted to reply to or to evaluate the program."

4. *Rowland's Vehicle Code section 2800.1 sentence was proper.*

Rowland contends the trial court erred by sentencing him for felony evading an officer with willful disregard for safety (Veh. Code, § 2800.2) because the jury only convicted him of misdemeanor evading (Veh. Code, § 2800.1). This claim is meritless.

Rowland argues the reporter's and clerk's transcripts "reflect that appellant was found guilty of both the felony and the lesser misdemeanor charges. However, only the verdict form for the misdemeanor conviction is found in the record. Since the trial court would not have taken both guilty verdicts, it seems clear that the felony verdict was actually not guilty."

The Attorney General, however, points out the supplemental clerk's transcript contains the "guilty" verdict form for felony evading, and that this and other parts of the record demonstrate the jury found Rowland guilty of the felony. The jury then unnecessarily filled out a "guilty" verdict form for the misdemeanor, a clerical error not caught by the trial court.

Rowland was properly sentenced for felony evading.

5. *Gang enhancements were improperly imposed on Tempson, Morris and Brown.*

Tempson, Morris and Brown contend the trial court erred by using the gang enhancement statute (§ 186.22, subd. (b))[4] to impose 15-year minimum parole eligibility terms on their attempted murder convictions. The Attorney General properly concedes these claims are correct.

Section 12022.53, subdivisions (b) through (d), imposes enhancements on defendants who personally use a firearm during the commission of an enumerated offense. Subdivision (e)(1) of that section extends these enhancements to any defendant who is also found guilty under the gang enhancement statute if a principal used a firearm. However, subdivision (e)(2) of section 12022.53 then provides: "An enhancement for participation in a criminal street gang . . . shall not be imposed on a person in addition to

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[4] Section 186.22, subdivision (b)(5) provides: "Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served."

an enhancement imposed pursuant to this subdivision, unless the person personally used or personally discharged a firearm in the commission of the offense."

As *People v. Salas* (2001) 89 Cal.App.4th 1275, 1281-1282, explained: "[W]here section 186.22 [the gang enhancement] has been found to be applicable, in order for section 12022.53 to apply, it is necessary only for a principal, not the accused, in the commission of the underlying felony to personally use the firearm; *personal* firearm use by the accused is not required under these specific circumstances. However, as a consequence of this expanded liability under section 12022.53, subdivision (e), the Legislature has determined to preclude the imposition of an additional enhancement under section 186.22 in a gang case unless the accused *personally* used the firearm."

Here, the trial court imposed 15-year parole eligibility terms on Tempson, Morris and Brown despite the fact they were not found to have personally used a firearm in committing the attempted murders. Therefore, the 15-year parole eligibility terms imposed on these three defendants must be stricken.

6. *Defendants' presentence custody credits should be corrected*.

Defendants[5] contend the trial court incorrectly calculated their presentence custody credits. The Attorney General acknowledges the trial court erred by not counting the day of sentencing.

The Attorney General concedes the defendants were all in custody for one day longer than they received credit for. (See *People v. Browning* (1991) 233 Cal.App.3d 1410, 1412 [day of sentencing counted for presentence custody credits even though it was only partial day]; *People v. Bravo* (1990) 219 Cal.App.3d 729, 735 ["It is presumed the Legislature intended to treat any partial day as a whole day. [Citation.] Conduct credits shall be computed on the full period of custody commencing with the day of arrest"].) Each defendant was shorted one day of presentence custody credit.

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[5] Although not all the defendants expressly joined in this claim, "[a] sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered. [Citation.]" (*People v. Taylor* (2004) 119 Cal.App.4th 628, 647.)

We will direct the trial court to prepare a corrected abstract of judgment showing the proper amount of presentence credits for each defendant.

7. *Clerical errors in abstracts of judgment.*

There appear to be errors in two of the abstracts of judgment. The abstract for Rowland reflects conviction for only five, not six, counts of attempted murder. The abstract for Tempson reflects conviction for six counts of attempted murder in its bottom half, but only five counts of attempted murder in its top half.

We will order these errors corrected. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [it is proper and important to correct errors and omissions in abstracts of judgment].)

DISPOSITION

The judgments are affirmed in part and reversed in part. Despite the fact there was sufficient evidence to sustain Rowland's conviction for felony false imprisonment, it must be reversed because the trial court neglected to instruct the jury on misdemeanor false imprisonment. The 15-year minimum parole eligibility terms imposed on the attempted murder convictions for Tempson, Morris and Brown are stricken. All defendants are entitled to one additional day of presentence custody credit. All of the other convictions and sentences are affirmed. The trial court is directed to prepare and forward amended abstracts of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J. ALDRICH, J.